

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DOUGLAS SHANES, Personal Representative of  
the ESTATE OF MARCELLA SHANES,

UNPUBLISHED  
February 20, 2007

Plaintiff-Appellant,

v

SHAHZAD A. SHAIKH, M.D. and W.A. FOOTE  
MEMORIAL HOSPITAL,

No. 264651  
Jackson Circuit Court  
LC No. 02-000044-NH

Defendants,

and

DR. JAVAID BASHIR, DOCTORS HOSPITAL  
OF JACKSON, DR. LOWELL FISHER, and  
NAVEED SIDDIQI, M.D.,

Defendants-Appellants.

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Before: Whitbeck, C.J., and Bandstra and Schuette, JJ.

PER CURIAM.

In this medical malpractice action, plaintiff Douglas Shanes, personal representative of the estate of Marcella Shanes,<sup>1</sup> appeals by leave granted the trial court's grant of partial summary disposition to defendants Dr. Javaid Bashir, Doctors Hospital of Jackson, Dr. Lowell Fisher, and Dr. Naveed Siddiqi (collectively "the doctors"). We reverse and remand.

I. Basic Facts And Procedural History

The decedent, Marcella Shanes, died July 30, 2000, as a result of a small bowel obstruction. On October 9, 2000, Nancy VanDam, the decedent's daughter, was appointed personal representative of her mother's estate and was issued letters of authority. On January 8, 2002, VanDam filed a complaint against defendants Shahzad A. Shaikh, M.D. and W.A. Foote

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<sup>1</sup> Hereinafter, unless otherwise indicated, use of the surname "Shanes" shall refer solely to plaintiff Douglas Shanes.

Memorial Hospital (Foote Hospital), alleging that Marcella Shanes died as a result of their medical malpractice. However, VanDam later filed a petition for resignation as personal representative, asserting that she was no longer emotionally able to act as the personal representative. Thus, on May 23, 2003, Shanes, the decedent's son, was appointed as successor personal representative. On March 16, 2004, after filing the necessary notices of intent,<sup>2</sup> Shanes filed an amended complaint, naming the doctors as defendants.

The doctors moved for summary disposition, arguing that Shanes' amended complaint was time barred because it was not filed within the two-year period following VanDam's appointment as personal representative.<sup>3</sup> The trial court granted summary disposition to the doctors, reasoning that Shanes' reliance on *Eggleston v Bio-Medical Applications*,<sup>4</sup> was misplaced because the instant action was factually distinguishable. More specifically, the trial court found that the facts of the instant action differed from *Eggleston* because, in that case, the successor personal representative was appointed before the original two-year period expired. Here, the two-year period expired while VanDam was the personal representative, and she failed to file suit against the doctors during that time, so "the case die[d]." The trial court continued,

Now, can we then wait until October 9 of 2002 until May 23rd of 2003 and say suddenly there's a reviving of the cause of action, which is what [Shanes is] claiming, that somehow you revive it somehow by this second appointment. To my mind there is a valid reason [why] we have a statute of limitations, because it's to prevent stale claims.

If Mr. Shanes decides he doesn't want to act then does he have another brother who's going to act and does that brother have a right to bring in someone else that was in the hospital, a nurse or someone else? The idea is that stale claims have to be barred at some point in time . . . . In my mind, the statute of limitations expired on October 9, 2002 and it was not revived just because Mr. Shanes was appointed in May of 2003.

But, with respect to Shaikh and Foote Hospital, the trial court held that Shanes' amended complaint was not time barred "because there's entitlement to amend an answer at any time and have it relate back."

Shanes filed a delayed application for leave to appeal, which a panel of this Court granted.<sup>5</sup> A stay of the trial court proceedings was granted with respect to the doctors, pending the outcome of this appeal.

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<sup>2</sup> MCL 600.2912b.

<sup>3</sup> MCL 600.5852.

<sup>4</sup> *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29; 658 NW2d 139 (2003).

<sup>5</sup> *Shanes v Bashir*, unpublished order of the Court of Appeals, entered December 9, 2005 (Docket No. 264651).

## II. Summary Disposition

### A. Standard Of Review

We review de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(7).<sup>6</sup> In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), "a court 'must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor.'"<sup>7</sup> Where there are no factual disputes, and reasonable minds cannot differ on the legal effects of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law, which we also review de novo.<sup>8</sup>

### B. Successor Personal Representatives And Claims Against New Parties

#### 1. Applicable Time Limitations

In general, a malpractice action must be brought within two years of the date of accrual to be timely.<sup>9</sup> However, there exists a statutory savings provision applicable when an action is brought on behalf of a deceased person.<sup>10</sup> That provision, known as the wrongful death savings statute, provides:

If a person dies before the period of limitations has run or within 30 days after the period of limitations has run, an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

Here, there is no question that VanDam's original complaint, filed on January 8, 2002, was timely under both the generally applicable statute of limitations and the savings provision. Further, upon his appointment while the original, timely filed complaint was pending, Shanes, as

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<sup>6</sup> *DiPonio Construction Co, Inc v Rosati Masonry Co, Inc*, 246 Mich App 43, 46; 631 NW2d 59 (2001).

<sup>7</sup> *Brennan v Edward D Jones & Co*, 245 Mich App 156, 157; 626 NW2d 917 (2001), quoting *Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999).

<sup>8</sup> *DiPonio*, *supra* at 47; *Brennan*, *supra* at 157.

<sup>9</sup> MCL 600.5805(6).

<sup>10</sup> MCL 600.5852.

successor personal representative, stepped into VanDam's shoes.<sup>11</sup> Accordingly, once appointed, Shanes had the same powers and duties as VanDam would have had.<sup>12</sup>

## 2. Amendments To Complaints

An amendment generally relates back to the date of the original filing if the new claim asserted arises out of the conduct, transaction, or occurrence set forth in the original pleading.<sup>13</sup> Had she not been replaced, VanDam could have freely amended her original complaint as it pertained to Shaikh and Foote Hospital, the originally named parties.<sup>14</sup> Therefore, the trial court correctly held that Shanes was also entitled to amend the complaint as it pertained to Shaikh and Foote Hospital.

However, although amendments generally relate back to the date of the original filing for statute of limitation purposes, the relation-back doctrine does not apply to the addition of new parties.<sup>15</sup> Commencement of an action against one party does not operate to toll the running of the applicable period of limitation with respect to other persons not named as defendants in that suit.<sup>16</sup> The statutory period continues to run until the time of the filing of the amendment; thus, the statute of limitations continues to run in favor of an alleged joint tortfeasor until it is made a party to the suit.<sup>17</sup> Accordingly, where a defendant is brought into an action for the first time through the filing of an amended complaint, the filing of the amendment constitutes the commencement of the action against that defendant.<sup>18</sup> And that party subsequently brought into the action may claim that he or she is not liable because the statute of limitations has expired.<sup>19</sup>

To overcome a statute of limitations defense brought by a later-added party, a plaintiff may counter that the new defendant is a necessary party, that the new party acquired its interest in the subject matter of the suit “pendente lite,” or that the amendment “merely corrects a

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<sup>11</sup> MCL 700.3613; *Boodt v Borgess Medical Ctr*, \_\_\_ Mich \_\_\_, \_\_\_ NW2d \_\_\_ (Docket No. 266217, Issued Oct. 31, 2006) (“[W]here the predecessor representative actually filed a complaint, and a successor representative is appointed while the complaint is pending, the successor must be substituted in the already-commenced claim.”).

<sup>12</sup> MCL 700.3613; see also MCL 700.3701 and MCL 700.3716.

<sup>13</sup> MCR 2.118(D).

<sup>14</sup> MCR 2.118(A)(2); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973).

<sup>15</sup> *Hurt v Michael's Food Center, Inc*, 220 Mich App 169, 179; 559 NW2d 660 (1996).

<sup>16</sup> *Ray v Taft*, 125 Mich App 314, 319; 336 NW2d 469 (1983).

<sup>17</sup> *Forest v Parmalee (On Rehearing)*, 60 Mich App 401, 406-407; 231 NW2d 378 (1975), *aff'd* on other grounds, 402 Mich 348 (1978).

<sup>18</sup> *Id.* at 406.

<sup>19</sup> *Id.*

defect in the original proceeding,”<sup>20</sup> such as when the right party is served under a wrong name or in an incorrect capacity.<sup>21</sup> In those situations, courts have deemed the applicable statute of limitations tolled because the true defendant had notice of the litigation and was not prejudiced by the amendment.<sup>22</sup> However, none of these exceptions apply here.

Here, VanDam was appointed as personal representative on October 9, 2000. Thus, there can be no dispute that, had she not been replaced, the claims against the doctors would have been time barred because VanDam only had until October 9, 2002 to add any additional alleged joint tortfeasors not named as defendants in the originally-filed complaint. But VanDam *was* replaced, so the pertinent question in this appeal is whether it was permissible for Shanes, as successor personal representative, to add the doctors as additional parties to the original action filed by the predecessor personal representative.

### 3. Interplay Between Time Limitations And Amendments Adding New Parties

The doctors argue that Shanes’ claims against them were untimely because they were not filed until after the time period during which VanDam could have timely filed those claims: within two years of her appointment as personal representative. In other words, the doctors contend that because, had VanDam not been replaced, it would have been untimely for her to add the doctors to the existing action, and, because Shanes stepped into VanDam’s shoes,<sup>23</sup> it was similarly untimely for him to add the doctors.<sup>24</sup>

Relying on *Eggleston*, Shanes contends that the plain language of MCL 600.5852 provides that his appointment as successor personal representative commenced a new two-year savings period. In *Eggleston*, the decedent’s widower was appointed temporary personal representative and was issued letters of authority on April 4, 1997, but he died several months later, on August 20, 1997, without having filed a claim.<sup>25</sup> The decedent’s son was then appointed successor personal representative and was issued letters of authority on December 8, 1998. He filed a complaint against the defendant on June 9, 1999. The issue in the case was “whether a successor personal representative has two years after appointment to file an action on behalf of an estate under the wrongful death saving statute, . . . or whether the two-year period is measured from the appointment of the initial personal representative.”<sup>26</sup> Interpreting the plain language of the wrongful death saving statute, the Michigan Supreme Court held that a successor

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<sup>20</sup> *Id.*, quoting 8 ALR2d 6, 112.

<sup>21</sup> *Ray*, *supra* at 320.

<sup>22</sup> *Id.*

<sup>23</sup> MCL 700.3613.

<sup>24</sup> See *McLean v McElhaney*, 269 Mich App 196; 711 NW2d 775 (2005) and *Estate of Harris v Bolling*, 267 Mich App 667; 705 NW2d 720 (2005).

<sup>25</sup> *Eggleston*, *supra* at 31.

<sup>26</sup> *Id.* at 30.

personal representative has two years after issuance of *his* letters of authority to file an action on behalf of the estate.<sup>27</sup> Thus, Shanes argues that his amended complaint adding the doctors was timely because it was filed within two years of the issuance of *his* letters of authority.

Although the numerous post-*Eggleston* decisions have come to many differing conclusions on the ability of a successor personal representative to pursue an action,<sup>28</sup> we conclude that this case presents yet another distinct set of circumstances warranting a unique application of the interplay between the applicable statutes of limitations, the Estate and Protected Individuals Code (EPIC), and the law governing the amendment of complaints to add new parties.

It is important to clarify that this case is distinguishable from a significant portion of the cases dealing with successor personal representatives because this case does not involve the filing of an *untimely* complaint by the original personal representative. That is, this case is factually distinguishable from those types of cases because the original complaint here was undisputedly *timely*. Thus, this case is distinguishable from those cases in which a successor personal representative attempts to continue an action by simply reviving or adopting a previously filed, *untimely* complaint.<sup>29</sup> Similarly, this case is also distinguishable from those cases in which a successor personal representative attempts to file a new action to overcome a predecessor's filing of an untimely action.<sup>30</sup> Stated differently, by filing his amended complaint Shanes was not attempting to circumvent his predecessor's filing of an untimely suit against the doctors because (1) the original complaint was timely, and (2) the doctors were not named in the original complaint.

As explained, where a defendant is brought into an action for the first time through the filing of an amended complaint, the filing of the amendment constitutes *the commencement* of the action against that defendant.<sup>31</sup> Thus, although Shanes' filing was submitted as an "amended" complaint, that filing effectively served as an original complaint against the doctors. And, as explained, that filing is to be governed by the applicable period of limitation, independent of the original filing.<sup>32</sup> Accordingly, we must determine what the applicable period of limitation is.

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<sup>27</sup> *Id.* at 33.

<sup>28</sup> See *Boodt*, *supra* at \_\_\_\_ (Whitbeck, C.J., *dissenting*).

<sup>29</sup> See *Mullins v St Joseph Mercy Hosp*, 269 Mich App 586; 711 NW2d 448, vacated in part and aff'd in part 271 Mich App 503 (2006); *Estate of Harris*, *supra* at 668 (holding that "the appointment of a successor personal representative cannot revive a complaint that the predecessor personal representative filed more than two years after being appointed.").

<sup>30</sup> See *McLean*, *supra*; *King v Briggs*, unpublished opinion per curiam of the Court of Appeals, issued July 12, 2005 (Docket Nos. 259136 and 259229).

<sup>31</sup> *Forest*, *supra* at 406.

<sup>32</sup> *Ray*, *supra* at 319; *Forest*, *supra* at 406-407.

The doctors argue that the applicable limitations period began to run with VanDam's appointment as personal representative. Shanes argues that the applicable period began to run with his appointment as successor personal representative. We agree with Shanes and conclude that this case is governed by the *Eggleston* rule. In *Eggleston*, the original personal representative died without taking any action against the defendant. The successor personal representative filed suit, which our Supreme Court held was timely filed within two years after the successor personal representative's appointment. We acknowledge the doctors' argument that under MCL 700.3613 a successor personal representative steps into the shoes of the predecessor, but *Eggleston* did not need to address the ramifications of MCL 700.3613 given that the original personal representative never filed an action before he died and, therefore, there was no prior action in which to substitute the successor personal representative. In other words, because the original personal representative took no action against the defendant, there were no acts to ratify, or no shoes into which to step. The same rationale applies here. Irrespective of VanDam's action against Shaikh and Foote Hospital, Shanes was entitled to his own two-year savings period in which to commence an action against the doctors.

Shanes was appointed as successor personal representative on May 23, 2003. Under MCL 600.2825, he had until May 23, 2005 to commence an action against the doctors. Shanes filed the amended complaint naming the doctors as defendants on March 16, 2004. Thus, we conclude that Shanes' amended complaint constituted a timely filing against the doctors, and the trial court erred in granting summary disposition in favor of the doctors.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Richard A. Bandstra

/s/ Bill Schuette